Case No. 18325
Dept. No. I

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

WILLIAM CODY KELLY, TRUSTEE
Under Trust Dated December 12, 1962
Plaintiff,
vs.
TAHOE REGIONAL PLANNING AGENCY, et al.
Defendant.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND JUDGMENT

INTRODUCTION:

This matter came on for trial starting on the 5th day of February, 1990, and was completed on the 6th day of March, 1990. The Plaintiff was represented by Daniel R. Walsh, Esq., and Jon Yaple, Esq. The Defendant Tahoe Regional Planning Agency was represented by Gary A. Owen, Esq., and J. Thomas Susich, Esq., of the firm of Crowell, Susich, Owen & Tackes, Ltd. The Defendant State of California was represented by Richard Skinner, Esq., Deputy Attorney General for the State of California. The Defendant State of Nevada was represented by Marta Adams, Esq., Deputy Attorney General for the State of Nevada. The court considered the extensive testimony presented at trial, the numerous documents and other items of evidence admitted and the briefs and arguments of counsel, and thus being fully advised in the premises hereby enters its Findings of Fact, Conclusions of Law and Judgment as follows:

FINDINGS OF FACT FOR PARTS I AND II OF THE COURT'S DECISION:

1. In 1963 William Cody Kelly [Kelly] heard about the studies of the Fleischmann Foundation toward creating an interest in regional planning at Lake Tahoe and was aware at that time of the discussion of perhaps creating an interstate agency to address problems that were occurring at the Lake.

2. The William Cody Kelly Trust [the Trust] acquired 44 acres of property adjacent to Lake Tahoe in Douglas County, Nevada, from the heirs of Sara Hamilton Fleischmann in September of 1966 for $500,000. [The Kelly property will be referred to as "Uppaway" from this point forward].

3. Uppaway was originally acquired to serve as a personal residence for Kelly, however prior to acquisition Kelly explored its development potential with a real estate brokerage firm. Kelly was advised that the property's ultimate value after development would be between $500,000 and $1,000,000. Kelly wanted to make sure that, when spending a sum of $500,000.00 for a residence, he could recover his investment in the property. If he could not sell the undeveloped land with existing residence to another person for $500,000.00, a means to recoup his investment would be through subdividing the land. Planking Area Statement No. 059, applicable to Uppaway, allowed single-family residential development at a density of one residential unit per acre.

4. At the time of Kelly's purchase of the 44-acre parcel, there existed on it the Fleischmann Mansion or "main house", comprising lot 19 of the present subdivision. The mansion was an object of Kelly's desire for a residence prior to his purchase of the land.

5. Kelly moved into the mansion in May of 1966 under a four-month lease-option to purchase. Kelly lived in the residence with his family from 1966 until 1984. He continued to maintain a residence in the guest house on lot 17, but at the current time he lives in Ohio. Apart from the

Fleischmann Mansion, when Kelly purchased the 44-acre parcel it also contained a caretaker's residence (lot 7) and the guest house on lot 17.

6. The Tahoe Regional Planning Agency [hereinafter "TRPA"] was formed by the States of California and Nevada and the United States of America through a bistate compact in 1969. The 1969 Compact found a need, "to maintain an equilibrium between the region's natural endowment and its man-made environment, to preserve the scenic beauty and recreational opportunities of the region . . ." and to establish "an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development. . . ."

7. Under the 1969 Compact, TRPA enacted a land use regulatory scheme requiring that local governments issue permits for projects in accordance with TRPA's regional standards. In doing so, the local governments were intended to utilize their own procedures but be bound by the substantive regional standards enacted by TRPA. The scheme also required TRPA to review permits for major developments and variances. TRPA's authority to approve or deny a permit, however, was only fully exercised to the extent the TRPA Governing Board could muster a dual-majority vote under art. III(g) of the 1969 Compact. In other words, the TRPA could not act without an agreement on action by a majority of both states' delegations to the Governing Board.

8. Kelly first attempted to subdivide Uppaway in 1974. Kelly submitted plans and maps to TRPA, approved by Douglas County, which depicted a Planned Unit Development [PUD] consisting of approximately 39 lots ["lots" refers to a 2,500 square foot building envelopes within the PUD] to be constructed in three phases. The property not contained within the Lots is common property within the PUD. The proposal was presented to the governing board of TRPA as a "major development" and received the following vote:

Five California Delegates Against
Two Nevada Delegates Against
Two Nevada Delegates For
One Nevada Delegate Absent

9. TRPA maintained, in an action before the Federal District Court for the District of Nevada, that this vote amounted to a disapproval of the PUD. The Court disagreed as reflected in an order entered on October 24, 1975 holding that under Article VI(k) of the 1969 Compact the action of TRPA amounted to "no action" and that the subdivision was "deemed approved" under the "dual majority rule".

10. In July of 1977 Kelly created Uppaway Development Company, a Nevada Corporation [UDC], and had the trust convey 28 of the 39 lots to it while retaining ownership of the remaining 11 lots. Kelly was president of UDC from its creation until he resigned in 1984. He was also a member of the board of directors until his resignation as president in 1984. The corporation was set up by Kelly upon advise of counsel. Kelly gradually transferred UDC's shares to his children and grandchildren, as part of his estate planning.

11. The eleven lots, which the trust retained, were the following:

A. The Hilltop Lots known as lots 33 through 39. All of these Hilltop Lots lie within phase three of the PUD.

B. Lot 7, the caretaker's home near the entrance.

C. Lot 17, the existing guest house, for which Kelly was asking the sum of $195,000.00 in 1989.

D. Lot 19, the Fleischmann Mansion, which later sold for $1.1 million.

E. Lot 32, a shoreline lot and foundation which was late sold for $522,500.00.

12. Phases one and two of the PUD were substantially completed and most lots within those phases were sold.

13. Kelly has derived substantial economic benefit from the development of Uppaway Estates of which the Hilltop Lots are a part.

14. In 1980 the TRPA Compact was amended by the Nevada and California Legislatures and the United States Congress. The amended compact deleted the dual majority rule and mandated that TRPA adopt environmental thresholds in order to protect Lake Tahoe.

15. On August 25, 1981 TRPA Ordinance 81-5 went into effect implementing the Lake Tahoe Regional Water Quality (208) Management Plan. Under the terms of this ordinance a planning team was appointed to evaluate all subdivisions within the Nevada portion of the Lake Tahoe Basin. This team was required to inspect all Nevada subdivisions and rate them for purposes of determining their compliance with the plan.

16. Under the then existing procedures case by case review of building lots and approval of building permits could be conducted only within subdivisions which had been rated as adequate or potentially adequate under TRPA Ordinance 81-5.

17. Uppaway was evaluated and it was determined that phases one and two were potentially adequate. Phase three was rated as being in need of further consideration because the subdivision improvements as to phase three had not yet been constructed.

18. On October 29, 1981 Kelly was specifically notified that the Hilltop portion of the PUD had been rated as in need of further consideration. He was advised of the method for appeal of the determination.

19. Kelly was notified once again of the phase three evaluation in a letter dated January 21, 1982 and once again was specifically advised of the appeal procedure. These notifications advised Kelly that he could not proceed with case by case review of the Hilltop lots until phase three received a rating of adequate or potentially adequate.

20. Sometime during the Fall of 1981, Robert Lahmann, an employee of Mr. Kelly, contacted TRPA with proposed modifications to the Hilltop. Mr. Lahmann proposed moving various lots, eliminating some lots and converting the rail access system [funicular] to the Hilltop into a roadway. Similar proposals had been make by Kelly through his counsel as early as the late 1970's.

21. Mr. Lahmann's proposal was reviewed and he was advised by letter dated December 23, 1981 that the proposal would have to be submitted in the form of an application to modify the Uppaway map and improvement plans.

22. In 1982 TRPA adopted its Environmental Threshold Carrying Capacities as mandated by the 1980 compact. Included in those thresholds were standards for water quality, both in Lake Tahoe and in its feeder streams, and for soil conservation, including the amount of impervious surface which could be created without undue stress upon the environment.

23. A meeting was conducted on June 4, 1982, in the offices of Governing Board Chairman Bennie Ferrari concerning the proposed changes submitted by Mr. Lahmann. Mr. Kelly was represented at the meeting by attorneys William T. O. Aird and Paul Hogan of the law offices of Daniel Walsh. Also present at the meeting were Gary Owen, TRPA's attorney, and Gordon Barrett, a TRPA employee.

24. During this meeting Mr. Kelly's representatives argued for the changes. Kelly was most concerned that the changes not be viewed as "substantial" in order to avoid having to have the matter reconsidered by the TRPA Governing Board.

25. It was agreed at the meeting that Kelly's proposed changes, including the elimination of Lot 35, would not be considered "substantial" by TRPA and that Kelly could proceed without submitting the change to the Governing Board.

26. Shortly after the meeting Kelly informed TRPA that he wished to eliminate lot 39 rather than lot 35. This change was agreed to by TRPA in a letter dated June 23, 1982 from Barrett to Walsh.

27. On July 22, 1982 Mr. Walsh sent a letter to TRPA memorializing the agreement regarding the changes. This letter was signed by Mr. Barrett and Mr. Ferrari. The letter provided that Kelly would have to follow the normal case by case review procedure before building permits could be approved.

28. On July 27, 1982 Kelly submitted applications for case by case review concerning Lots, 33, 34, 35, 36 37 and 38. No appeal concerning phase three's rating of "in need of further consideration" was filed.

29. The case by case review office had numerous applications before it during the Fall of 1982. In January of 1983 Mr. Walsh was notified by TRPA that on site inspection of the lots would have to be delayed due to the heavy snow which occurred that year. On February 9, 1983 Mr. Walsh acknowledged the snow problem in a letter to TRPA.

30. In July of 1983 Mr. Walsh sent a letter to Louis R. Doescher, TRPA's attorney, complaining that he thought that phase three had been rated as adequate under the subdivision review procedure outline in Ordinance 81-5. Mr. Walsh felt that by allowing subdivision improvements to phase three to be constructed, TRPA was admitting that it was adequate under the ordinance. Ordinance 81-5 provides that a rating of adequate or potentially adequate can be given only after the subdivision improvements have been constructed and inspected.

31. TRPA continued to attempt to complete the case by case review of the lots during the Summer of 1983. On July 21, 1983, TRPA offered to work with Kelly to attempt to have the subdivision inspected during the Summer of 1983 in order to try to gain a potentially adequate rating.

32. On August 26, 1983 the Governing Board of the TRPA adopted a moratorium preventing further evaluation of case by case applications until adoption of an Amended Regional Plan mandated by the 1980 amended compact. This action was based upon the advice of counsel and concern that continued approvals by TRPA prior to adoption of the amended plan would be illegal as being in violation of the compact and would place the property owners themselves in potential jeopardy.

33. TRPA advised Kelly that it would attempt to immediately complete processing of the Hilltop case by case applications as soon as the moratorium was lifted.

34. On October 10, 1983 Kelly completed the subdivision improvements which allowed phase three to be evaluated and rated as potentially adequate.

35. On April 26, 1984 TRPA adopted its Amended Regional Plan. This plan provided under section 4.20 that completed applications on file before August 26, 1983 would be processed under the old procedures. Thus Kelly's application would have been processed if the amended plan had remained in effect.

36. On April 26, 1984, the same day as the amended plan was adopted, suit was filed against TRPA by the Attorney General of the State of California and the League to Save Lake Tahoe in the Eastern District of California. As a result of that suit a restraining order was issued by the Federal Court on or about May 1, 1984, prohibiting TRPA from acting to approve projects under the amended plan. An opinion transforming the TRO into an injunction was issued by the court on June 15, 1984. The actual preliminary injunction order was signed on August 9, 1984. the August 9, 1984 Injunction was appealed by TRPA to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed.

37. In his order converting the TRO into a Preliminary Injunction, the court stated, among other things, that the provisions contained within the 1984 Amended Plan allowing processing of case by case applications under the old plan

[4.20] was in violation of the environmental thresholds, among other things, and thus was illegal under the new compact.

38. TRPA was thus prohibited from processing Mr. Kelly's case by case applications concerning the Hilltop lots by action of the Federal District Court for the Eastern District of California as approved by the Ninth Circuit Court of Appeals.

39. Settlement negotiations were initiated in 1984 between the parties to the federal law suit in order to see if a new plan could be developed which would comply with the compact and environmental threshold carrying capacities.

40. It was decided to create a "Consensus Building Workshop" [CBW] in order to develop a new plan. The CBW was open to all interested persons and included local residents and varied experts and authorities.

41. Lake Tahoe is in many ways unique among the large lakes of world. Considering its surface area and volume, Tahoe has a relatively small watershed which, in its natural condition, produces few nutrients which enter the Lake via the more than 100 streams which flow into Tahoe. As a result, Tahoe is regarded as an ultraoligotrophic lake, and only Crater, Lake, in Oregon, and perhaps Lake Baikal in Irkutsk, U.S.S.R., are comparable large aline lakes in water quality and clarity.

42. The retention time of water entering Lake Tahoe approximates 700 years, meaning that, if sediments or nutrients enter the Lake from any source, it can take about seven centuries before such material may be removed by outflow via the Truckee River, Tahoe's only stream outlet. This lengthy retention time requires a conservative approach to allowing nutrient inputs to the Lake; once such nutrients get into the Lake, they remain there virtually permanently for all human considerations.

43. Since about 1960, when human development in the Basin commenced at high rates, the amounts of phosphorus, nitrogen and trace metals important to algal growth in Lake Tahoe have increased beyond historical levels. Studies by the Tahoe Research Group indicate that the algal growth rate of Tahoe, itself dependent on nutrient input to the Lake's waters, has been increasing at a rate of about 5 1/2 percent per year. As a consequence, Lake Tahoe is losing its famous clarity at the rate of about 1/2 meter per year. Unless this growth rate of nutrient input to Lake Tahoe is halted and even turned around, the Lake may be transformed forever into an ordinary algae-ridden water body in as few as 40 years.

44. When TRPA put together its 1987 Regional Plan it faced a Tahoe Basin which already was significantly committed to development. Large gaming casinos, ski-areas, commercial and residential development with corresponding destruction of important nutrient-stripping wetlands had taken place in the prior three decades. Additionally, more than 17,000 single family parcels, including Plaintiff's, remained in the inventory of unbuilt parcels, many located in environmentally-sensitive areas: steep slopes, wetland, and/or relatively erodible soils. Because the uncontrolled development of all these parcels would likely ensure the permanent loss of Lake Tahoe to eutrophication in the near future, TRPA, pursuant to the Compact, was required to construct a regulatory matrix which included a reasonable and responsible program for governing the future of these undeveloped single family parcels. That program entitled the Individual Parcel Evaluation System (IPES), after development by the CBW, was adopted by TRPA as part of its Code of Ordinances on May 27, 1987.

45. The new plan [1987 Plan], including IPES, went into effect in July of 1987.

46. Kelly was thus required, due to the actions of the Federal District Court for the Eastern District of California, and the subsequent adoption of the 1987 plan, to have his

lots evaluated under the 1987 Plan, which included IPES, before those lots could be developed.

47. Under IPES, TRPA sends a team of experts to evaluate each vacant single family parcel, primarily for erosion hazard and runoff potential. Each evaluated lot receives a score, and then, in each of the five counties around the Tahoe Basin, each such lot is ranked against its counterparts. Based upon a statistical formula, TRPA then established an initial minimum score; those lots with scores above that minimum were eligible to be developed, subject to other conditions not at issue in this case, while those whose scores fell "below the line" were required to wait for eligibility. The initial minimum score established by this process was 725.

48. Kelly's Hilltop Lots were evaluated under IPES and received the following IPES Scores:

Lot 33 679
Lot 34 531
Lot 35 629
Lot 36 758
Lot 37 615
Lot 38 635

Since Lot 36 received a score above 725 it is immediately eligible.

49. Kelly appealed the remaining scores under Subsection 37.10.D of the Code of Ordinances and Rules of Procedure of the TRPA. Under this procedure the appealed lots were reevaluated under IPES by a new team and new scores were issued. The appealed scores are:

Lot 33 725
Lot 34 694
Lot 35 737
Lot 37 702
Lot 38 693

Therefore under the IPES criteria all but three of Kelly's lots are immediately eligible.

50. IPES includes a process whereby, in each county where certain conditions are met, which include such things as installation of erosion control measures, monitoring of water quality, and the like, the minimum IPES score to be eligible will be reduced each year. As the "line" moves, down, lots with lower scores will become eligible to build. Theoretically, over time, all the vacant lots in the Basin will become eligible to build, with those scoring the lowest being last in line.

51. IPES makes an exception to the above stated general rule for eligibility in that those lots which are part of what TRPA calls Stream Environment Zones, or SEZs, are permanently barred from development because of the extreme environmental hazard created by such development. None of Kelly's lots are within an SEZ.

52. Kelly argued at trial, and presented evidence contending, that IPES is not reasonably related to a reduction in the continuing decline of Lake Tahoe. While there currently are no studies comparing the full extent of natural nutrient loading at Lake Tahoe versus that loading due to cultural activities in the Basin, even small amounts of additional loading from unnatural sources can play a disproportionate role in upsetting Tahoe's natural equilibrium.

53. The nutrients included by Kelly's expert, Timothy Durbin, in his budgets, i.e., dissolved inorganic nitrogen and soluble reactive phosphorus, are not the only significant forms of nitrogen and phosphorus in evaluating the causes of algal growth and the eutrophication of Lake Tahoe. Although the complete processes of the cycling of nitrogen and phosphorus at Lake Tahoe have not been quantified because of the complexity of the ecosystem, particulate and organic forms of both nitrogen and phosphorus are an important, if not more important, source of nutrients to the more than 100 forms of Tahoe algae because of the recycling of nitrogen and phosphorus from one form to another and back again in the natural cycles of each.

54. The processes to be evaluated in depicting a complete nutrient budget for Lake Tahoe are far more complex than the simple, two-chemical evaluation utilized by Mr. Durbin to support his theses about the Lake. TRPA, in conjunction with the Tahoe Research Group and the Lake Tahoe Interagency Monitoring Program, have been engaged in an effort to describe a thorough nutrient budget for Tahoe for some years, but it will take much more work, time and funding before the results are complete enough to describe all the processes affecting algal growth in Lake Tahoe. However, it is unnecessary, for policy making purposes, to have a complete nutrient budget for Tahoe. Scientists studying the Lake have identified a variety of sources of causes of eutrophication of Lake Tahoe, including land disturbance; TRPA is well-justified in attempting to reduce or control those sources of causes as they are identified, without waiting until the total process can be more perfectly quantified, so long as it continues as well to conduct further base-line and research studies.

55. Mr. Durbin's budget analysis is further flawed in its approach, whereby he attempts to explain all the nutrient-contributing processes in Tahoe's entire ecosystem by a simple examination of an isolated part. Not only is it not valid to extrapolate conclusions about other, entirely different processes form such an analysis, Mr. Durbin's efforts ignored the extraordinary dynamism of the whole.

56. Since particulate and organic forms of nitrogen and phosphorus are derived almost entirely from land disturbance at Tahoe, Mr. Durbin's failure to consider these forms in his budgets results in those budgets being greatly oversimplified in their attempts to describe nutrient processes at Lake Tahoe as being derived primarily from atmospheric sources. For similar reasons, Mr. Durbin's budgets fatally understate the contribution of development to nutrient loading of total nitrogen and total phosphorus to Lake Tahoe.

57. As Lake Tahoe has received greater quantities of nitrogen from human influences on the Basin, other nutrients are beginning to play more significant roles in governing the growth and rate of growth of eutrophicating algae. At times, phosphorus is the limiting nutrient in such processes, and trace elements also seem to play critical parts in stimulating algal growth. Since these nutrients all derive almost entirely from land disturbance, as contrasted to atmospheric inputs, Mr. Durbin's failure to analyze fully these other nutrients is another flaw in the conclusions he draws form his attempted depiction of nutrient processes at Lake Tahoe.

58. While Mr. Durbin's theoretical budget work rested entirely on limited forms of nitrogen and phosphorus, by which he attempted to draw valid conclusions about the causes of Tahoe's eutrophication, actual bioassay studies of a variety of nutrients, performed under carefully controlled scientific conditions, reveal that such causes are much more complex than Mr. Durbin's analysis comprehends.

59. Such bioassay analyses demonstrates that the simple addition of nitrogen or phosphorus to Tahoe's lake water produces limited or no algal growth response. Similar results are obtained when the chemicals contained in atmospheric pollution are added to lake water. Such experiments come closest to mirroring the simple processes analyzed by Mr. Durbin's work. On the other hand, when Tahoe stream water, with all the complex chemicals, including nitrogen and phosphorus in all their forms, as well as the various trace elements, found therein, is added to Tahoe lake water, the algal growth rate is highly stimulated. These experiments tend to show that land disturbances in the Tahoe Basin, which particularly enriches the input of particulate and organic nitrogen and phosphorus as well as trace elements to the Lake via streams, is an important factor which TRPA must address in its attempt to halt and reverse Tahoe eutrophication.

60. Lake Tahoe, before modern human influence, was able to maintain its ultraoligotrophic state notwithstanding some natural nutrient loading from the atmosphere and from its watershed. The amount of that natural loading is unknown. Since the cause of Tahoe's increasing eutrophication stems from the increment of nutrient loading introduced by human behavior, Mr. Durbin's depiction of the relative amount of such loading, compared to total loading, misses the point, even if such depiction were reliable. Even if the increment from human behavior is quite small relative to the total, controlling that increment is the most reasonable and appropriate strategy for TRPA to undertake to restore the Lake to natural equilibrium.

61. Even giving Mr. Durbin's limited nutrient analysis unwarranted credibility, he still concedes that land disturbances from development in the Tahoe watershed contributes at least six percent of the total load of dissolved inorganic nitrogen to Lake Tahoe, and at least 3,000 tons of a total of 24,000 tons of sediment annually. While these amounts may be small relative to the total inputs hypothesized by Mr. Durbin, they are part of the human-induced increment which has brought Lake Tahoe out of ultraoligotrophic equilibrium, and thus are part of the loading which TRPA properly must endeavor to reduce or eliminate.

62. Plaintiff's experts produced no credible evidence that atmospheric pollution is transported from the urbanized coast and valley west of the Basin to Lake Tahoe. To the contrary, defendants' expert, Dr. Cahill, testified that the primary airsheds from which prevailing winds blew into Tahoe were in the Pacific and the northwestern continent — some of the cleanest airsheds in the world. The bulk of atmospheric deposition of nutrients on Lake Tahoe thus likely is produced within the Basin itself.

63. Studies of Tahoe's sediment core, conducted by the Tahoe Research Group, demonstrate a profound change in the diatom population of Lake Tahoe occurred around 1960, coincident with the onslaught of modern land development in

the Basin. This diatom change is demonstrative of Tahoe's trend towards eutrophication, which began at that time. The same sediment core studies show an increase in the rate of sedimentation input into Lake Tahoe, which increase could only have been caused by land disturbance, as opposed to an increase in atmospheric pollution.

64. The sediment core studies did not show that Tahoe suffered any lasting increase in either sedimentation rate or nutrient input rate as a result of logging practices in the Basin during the late nineteenth century. Such a result is best explained by the testimony of Dr. Margaret Davis, who described scientific studies of other lakes and watersheds which underwent similar perturbations and reacted much like Lake Tahoe has. In those other cases, the impact from logging in past centuries was relatively minor, as natural processes were able rapidly to recover from such disturbances. On the other hand, when permanent housing development took place in the same watersheds, the nutrient and sediment input to the affected lakes was much greater and quite persistent.

65. The use of best management practices (BMPs) to reduce erosion and runoff is valid strategy employed as part of TRPA's regulatory practice to reduce or eliminate input to Lake Tahoe from land usage. BMPs, however, are not a panacea. There are no guarantees that such practices will be maintained over the life of the particular development whose impacts are meant to be addressed by the BMPs, and TRPA's experience demonstrates that such long-term maintenance is an exception, rather than the rule. When not maintained, BMPS inevitably fail, and their value in controlling sediment and nutrient inputs to the Lake commensurately dwindles. Accordingly, it is not irrational of TRPA, in IPES, to deny special credit to land developers like plaintiff for its installation of BMPs on its property — particularly because TRPA, as a matter of course in its 1987 Regional Plan, requires every land developer to install at least a minimal level of such BMPs.

66. Over time, unless the accumulation of silt and sediment in the Uppaway infiltration trench system is periodically and effectively removed and disposed of outside the Basin, the drainage control system in that development will become ineffective in trapping such sediments. Eventually, the system will fail altogether from overload.

67. Nutrient uptake processes take place, for the most part, in the shallowest portion — no deeper than three or four inches — of the soil profile. The infiltration of water below this zone of uptake, as is accomplished by the infiltration system at Uppaway, impedes for a time the ability of plants to accomplish nutrient removal, ensuring a nutrient-enriched groundwater, but there is no indication that this nutrient groundwater reaches the Lake from the slopes of Uppaway.

68. Loss of vegetation through development causes the loss of the ability of the natural environment to remove nutrients from surface and near-surface waters, thus contributing to nutrient loading of streams and groundwater. The limitation in IPES on the creation of impervious surfaces via development is a valid strategy to limit the loss of such nutrient-stripping vegetation.

69. Cagwin soils make up most of the soils at Uppaway. When those soils are compacted, they are susceptible to a great deal of runoff and a high rate of erosion. These problems are dangerously exacerbated during major storm events such as when warm spring rain falls on a major snow pack.

70. The results derived from the rainfall simulation experiments of Douglas Guerrant, plaintiff's expert, were fatally affected by flaws in experimental design and methodology. Of the four devices utilized in the experiments, only one produced dat that even plaintiff could characterize as useful. However, in that experiment, Mr. Guerrant, by raking the soil in the test plots which were claimed to reproduce sites which emulated development, created plots which were calculated to produce the highest

rate of *infiltration* — a condition not extant on actual developed sites. As a consequence, Mr. Guerrant's results greatly overstated the ability of Uppaway's soils to withstand erosion and runoff upon development. Notwithstanding, Mr. Guerrant's results confirmed TRPA's view that slope and disturbance are major factors producing soil loss, and that Cagwin soil, when compacted is highly erodible.

71. The study by Mr. Mahannah of five Tahoe watersheds, even if its limited scope is given credit, did not show that construction does not contribute to nitrogen and phosphorus loading of streams; indeed, Mr. Mahanna's study revealed that, in many cases, loading of those nutrients was greater in the streamwater below development than above.

72. Phosphorus, nitrogen and some important trace elements in Lake Tahoe are in fact increasing beyond their historical levels.

73. Increased levels of nutrients are in fact causing increased algal growth.

74. Increased algal growth and sedimentation do in fact cause loss of water clarity.

75. Sediment and nutrient transport from so-called "hazardous" residential areas are in fact having a meaningful and pronounced effect on the contribution of phosphorus and nitrogen and trace elements to the Lake.

76. IPES, as evaluated in this case, is an evenly applied and non-discriminatory effort to control or reduce nutrient and sediment inputs to Lake Tahoe from residential development. TRPA's IPES program, because it attempts to predict the relative contributions of both organic and inorganic forms of nutrients, dissolved and particulate, is properly aimed at regulating the input of all these nutrients to the Lake from the development of single family homes in the watershed.

77. The Hilltop Lots, the subjects of this action, maintain current, substantial value under the regulations of the 1987 TRPA Regional Plan.

78. In addition to the above findings, the Court incorporates the findings set forth in the Court's Order Partially Granting and Partially Denying Motions for Summary Judgment signed on August 23, 1989.

Based on the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW:

1. The Plaintiff having conceded at the hearing on Defendants's Motions for Summary Judgment that he was not seeking monetary relief against individual members of TRPA's Governing Board, said defendants are entitled to judgment against Kelly on any claims for relief alleging damages against them.

2. Despite major changes since 1979, the TRPA is still an independent agency. The Plaintiff has produced legally insufficient evidence to establish that the Agency is the alter ego of either State Defendant; moveover, there is no evidence that Nevada or California officials acted in an actionably tortuous or condemnatory fashion. The dismissal of the State Defendants is therefore appropriate.

3. Plaintiff has no standing to collaterally attack a neighboring federal court ruling nor has Plaintiff established a basis for relief under a malicious prosecution theory against the State of California.

4. The action of the Federal District Court for the Eastern District of California cannot form the basis of a claimed taking and therefore Plaintiff is entitled to no relief for an alleged *First English* taking during the time the Federal court injunction prevented TRPA from allowing Plaintiff to develop his property.

5. Plaintiff, having proved no Constitutional violations, is entitled to no relief under 42 United States Code Section 1983.

6. Plaintiff has failed to demonstrate that TRPA has deprived him of procedural due process. Procedural due process rights do not include the right to force an agency to take action on permit application.

7. TRPA's ordinances 81-1 and 81-5 were written to apply to all property owners on the Nevada side of the Tahoe Basin. Those procedures were evenly and properly applied and therefore Plaintiff was not denied the equal protection of the laws.

8. TRPA's powers are derived from a federal Compact ratified by the Congress of the United States. The Compact itself is a congressional exercise of power under the Compact Clause and amounts to federal legislation. As federal law, the regional plan adopted by the TRPA preempts state law and state constitutional provisions. Accordingly, any claims asserted by the Plaintiff based upon Nevada's Constitutional provisions should be dismissed.

9. To date Plaintiff has received no building permits for construction on the parcels in question. Having not yet received building permits he has no vested rights as a matter of law.

10. Plaintiff has failed to prove that TRPA's conduct concerning the regulation of building on Plaintiff's property was the product of inaction or discrimination directed against Plaintiff. Given the context in which TRPA's activities must be placed, the court concludes that Plaintiff is not entitled to estoppel relief as claimed in the complaint.

11. Plaintiff has an adequate remedy at law for any temporary taking of his property and therefore is not entitled to estoppel relief.

12. There is no evidence of fraud or malice on the part of TRPA and therefore Plaintiff is not entitled to punitive or exemplary damages.

13. There is legitimate governmental interest in the protection of the Lake Tahoe Region by attempting to insure an equilibrium between its natural endowment and its

manmade environment. The Court has found that the IPES system examines runoff and erosion hazard characteristics of individual lots and anticipates the effect which development may have on sediment and nutrient transport. Even though the IPES point system, for the most part, discounts the mitigating effect which best management practices may have upon nutrient and sediment transport, it is, nonetheless rationally based because it evenly and scientifically rates runoff potential and erosion hazard which might ultimately flow from the parcels it measures. Therefore, the regulatory system predicated upon IPES is a valid exercise of the police power.

14. The 1987 TRPA Regional Plan and its implementing ordinances, including IPES, are facially constitutional.

15. TRPA's 1987 Regional Plan and ordinances, including IPES, substantially advance the legitimate governmental interest in the protection of the Lake Tahoe Region.

16. TRPA's 1987 Regional Plan and ordinances adopted thereunder, including IPES, do not deny Kelly the economically viable use of the lots which are the subject of this action.

17. Kelly has failed to present sufficient evidence that his parcels have been permanently taken by action of the TRPA since IPES contains a procedure which will allow the "cut off line" to move downward thereby making it likely that all of Kelly's lots will eventually become eligible for building permits. TRPA's 1987 Regional Plan and ordinances adopted thereunder, including IPES, do not, therefore, take Kelly's lots, the subjects of this action, without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

18. TRPA's Ordinances 81-1 and 81-5, and each of them, substantially advanced the legitimate governmental interest in the protection of Lake Tahoe and did not deny Kelly the economically viable use of his lots, the subjects of this action. TRPA's Ordinances 81-1 and 81-5, and each of them, do not violate Kelly's right to substantive due process of law

under the Fifth and Fourteenth Amendments to the United States Constitution. TRPA's Ordinances 81-1 and 81-5, and each of them, did not, permanently or temporarily take Kelly's lots, the subject of this action, without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

18. Kelly is entitled to no damages for an alleged temporary taking during the period between August 26, 1983 and April 26, 1984, known as the "moratorium", since TRPA's suspension of review of building permit applications was done in good faith for a significant public purpose and was reasonable in duration given the complexity of the tasks undertaken.

19. Kelly is entitled to no damages for an alleged temporary taking between April 26, 1984 and May 27, 1987, the effective date of the 1987 Regional Plan, since the inability of TRPA to authorize construction during this period was the result of a Federal District court order over which TRPA had no control.

20. Kelly is entitled to no damages for an alleged temporary taking after May 27, 1987 since Ipes [*sic*] is a rationally based system calculated to help prevent degradation of Lake Tahoe and thus benefits Kelly directly. Further, TRPA's 1987 Plan, including IPES, does not violate Kelly's right to substantial due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

21. As long as the benefit received by the property from the ordinances is direct and substantial and the burden imposed is proportional, the TRPA can force landowners like Mr. Kelly to postpone their building plans for a reasonable period of time.

22. Neither the 1987 Regional Plan for the Lake Tahoe Basin nor the Code of Ordinances, nor any predecessor plan or ordinance, have deprived Mr. Kelly of his interest in property in a manner requiring compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

23. Neither the 1987 Regional Plan nor the Code of Ordinances, nor any predecessor plan or ordinance, has deprived Kelly of this right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

24. Plaintiff is entitled to no injunctive relief.

Based upon the above stated Findings of Fact and Conclusions of Law the Court enters its

JUDGMENT:

Judgment is entered as follows:

1. Based upon the findings and conclusions set forth herein, as well as the findings and conclusions set forth in the court's order of August 23, 1989 partially granting and partially denying motions for summary judgment, the States of Nevada and California are dismissed from this suit as parties defendant.

2. Judgment is entered in favor of TRPA and against the Plaintiff as to the following causes of action and claims for relief:

A. All malicious prosecution and conspiracy claims.

B. All claimed denials of civil rights.

C. All due process claims under the United States Constitution.

D. All takings claims under the United States Constitution.

E. All equal protection claims under the United States Constitution.

F. All claims under the Constitution of the State of Nevada.

G. All claims of vested rights.

H. All estoppel claims.

I. All claims for injunctive relief.

J. All claims for punitive and exemplary damages.

K. Any and all additional claims contained within the complaint as more fully set forth in the Court's Order Partially Granting and Partially Denying Motions for Summary Judgment signed on August 23, 1989 and the Court's Decision filed on July 13, 1990.

3. Defendant TRPA is awarded its costs in the amount of $241,836.69 and its attorneys fees in the amount of $7,500.00, (please see Court Order dated February 20, 1991 and the Explanatory Order filed of even date herewith).

FINDINGS AND CONCLUSIONS FOR PART III OF COURT'S DECISION:

1. Uppaway Estates is a planned unit development of 44.45 acres located at Glenbrook, Lake Tahoe, Nevada. Plaintiff Kelly purchased this property in 1966 which was and still is zoned one acre residential by Douglas County Ordinance.

2. In 1972 the estate contained three residences consisting of the main house, a guest house and a caretaker's house. From early on, Mr. Kelly intended to develop the property because he thought 44.45 acres was too large for one residence, and he thought he could recover his investment.

3. In 1972 the Tahoe Regional Planning Agency (TRPA) adopted a Land Use Ordinance for the entire Lake Tahoe Basin imposing population density controls and land coverage limitations. This ordinance limited development on the Kelly property but allowed for variances if it could be demonstrated that the project would not cause detrimental environmental consequences.

Accordingly, Mr. Kelly sought to design a development in such a way to demonstrate that it would cause no environmental harm to Lake Tahoe, even though the land coverage

limitations imposed by the TRPA Land Use Ordinance would be exceeded. In doing so he needed a variance.

Section 8.25 of the TRPA Land Use Ordinance provided:

Additional Land Coverage — Administrative Permit

> "Land coverages in excess of those permitted in any Land Capability District may be authorized by administrative permit issued by the permit-issuing authority upon a showing in a Land Capability Report by the applicant, in accordance with the applicable provisions of the Rules and Regulations of Practice and Procedure, that:
> * * * * *
>
> (2) the applicant's proposed development, as designed and located, will not cause the detrimental environmental consequences on the land of the applicant, or on other lands or waters, that were the basis of the classification of the applicant's land in the applicable Land Capability District in the first instance."

4. The tentative map of Uppaway Estates which depicted each building envelope as to site and size, was presented to and, after public hearings, approved by the Douglas County Planning Commission and the Douglas County Board of County Commissioners in 1974. The project consisted of 39 residences on the 44.45 acres not to exceed 2,500 square feet of impervious cover for each building envelope with the one exception of the main residence built in 1938.

5. The permit issuing authority for variances in this case was the Douglas County Board of County Commissioners. The Douglas County Planning approved the project on August 27, 1974. On September 20, 1974, the Douglas County Commissioners approved the tentative map and issued an administrative permit to allow land coverage in excess of those permitted by the TRPA Land Capability Districts on the subject property, pursuant to Sec. 8.25 of the TRPA Land Use Ordinance.

> "[T]he applicant's proposed development, as designed and located will not cause the detrimental environmental consequences on the land of the applicant or on other lands or waters, that were the basis of the applicable Land Capability District in the first instance."

6. The tentative map and administrative permit were then taken to the TRPA for review which held three separate hearings before its Governing Board. Kelly presented evidence and testimony of six (6) expert witnesses on soil, geology, surface drainage, and the inherent design relationship, water and fire hazard.

7. The TRPA Governing Board vote on the development resulted in a lack of a dual majority, which, under the language of the TRPA compact at that time resulted in approval. However, TRPA wished to test this procedure and filed suit against Plaintiff, Kelly and Douglas County attempting to annul the Douglas County Administrative permit and the "deemed-approved" mechanism. The United States District court held:

> (1) the project is approved under the compact because of lack of dual majority vote.
>
> (2) that the Douglas County variance was legally granted, permitting the excess ground coverage for Uppaway.

The TRPA Governing Board concluded that further legal action on behalf of the staff was unwarranted and the District Court decision became final.

As a result of the Federal Court litigation this Court finds that the issues presented to the Federal Court have been fairly tried by a competent tribunal and the doctrine of res judicata is applicable to these issues. However, events occurring since approval have caused the parties to become more and more uncertain about the exact application of the Federal Court ruling to the hilltop. Examples include some intervening changes sought to the subdivision itself and the

evolution of a new Plan and several new Ordinances not within the contemplation of the Federal Court.

8. To give these issues an historical setting, Mr. Kelly planned to improve and sell off units in the development in orderly phases, with the lakeshore lots to go on line first, the tennis court lots to follow, and finally the hilltop that is the subject of this litigation. No unreasonable delays on Kelly's part interrupted this orderly procession.

9. In 1981 it was determined that a road to the hilltop would be more suitable than a funicular and plans were drafted for this purpose using no more coverage than that authorized for the funicular. Among other reasons, the fire chief and sheriff sought a road for purposes of fire protection and law enforcement. On April 30, 1981, Mr. Barrett wrote a letter to Douglas County reciting in pertinent part:

> "TRPA staff considers this modification of access and land coverage to be a significant modification to the TRPA approval and, therefore, subject to Governing Board approval."

10. Robert Lahmann moved to Uppaway in 1976 to serve as on-site manager for Mr. Kelly. He continued in this position until 1982 (Tr. 333). Gordon Barrett, Senior Planner for the TRPA, was delegated the overall supervision of the Uppaway project by TRPA Executive Secretary Overynder.

11. In the summer of 1981 Mr. Lahmann prepared a draft proposal to "settle all the issues" between the TRPA and Uppaway. This overture proposed to eliminate two hilltop lots to overcome Mr. Barrett's objection to the hilltop lots. Lahmann had advised Barrett that Uppaway had not been over covered and would provide a survey.

12. In the fall of 1981 an application was made to the TRPA for a building permit for lot 34. See Plaintiff's Exhibit 1-2 for location. The TRPA staff responded with a letter dated October 29, 1981, reciting:

"On August 25, 1981, Ordinance 81-5 went into effect***"

"In processing your individual application, it has been found that your lot is a critical land capability area and is located within a subdivision which has been classified as of in need of further consideration. Therefore, your application will not be eligible for review until (1) drainage and erosion control improvements are made to the subdivision, as per plans approved by the Agency and the subdivision is then reclassified as either "adequate" or "potentially adequate"; or (2) adoption by the Agency of amendments to the Regional Plan pursuant to Article V(c) of the Compact."

13. At this point in 1981 TRPA staff discounted the prior approvals for Uppaway by the Douglas County Planning Commission, Douglas County Commission, the TRPA and the United States District Court. Ordinances 81-1 and 81-5 and the 1987 Regional Plan gave the TRPA staff (which has never liked the coverage aspects of Uppaway) successive, arguable reasons for reasserting jurisdiction.

81-1 proscribes:

"[T]hose activities *NOT* having a substantial effect on the land, water, air, space or other natural resources of the Tahoe Region and are *NOT PROJECTS* under the Tahoe Regional Planning Compact, as amended and not subject to review and approval of the agency confirming that such activities will not have a significant effect on the environment and thus exempt from the requirement of preparation of an environmental impact statement." (Emphasis added.)

81-1 Section 2:

"Critical area. An area within the Region that is of such sensitivity that any activity may substantially affect the land, water, air space or any other natural resource in the region. (1) Critical land capability areas, including high hazard lands (land capability districts 1a, 1b, 1c and 2)."

Section 3.10

"Residential activities

"The residential activities set forth in Sections 3.11, 3.12 and 3.13 are *not "projects"* within the meaning of the Compact * * * and are exempt from the Agency's review and approval.

3.12 New Residential Construction

"The following activities are exempt if they are located in a subdivision approved by the Agency after February 10, 1972, which subdivision was approved without reliance upon sections * * * 8.25(2) * * * of the Agency Land Use Ordinance."

Uppaway was approved pursuant to a variance granted under section 8.25(2), but the TRPA was taking the position that Ordinance 81-1 classifies the Uppaway hilltop lot as a new "project".

14. Ordinance 81-5 purports to prohibit development in land classified as high hazard.

Section 12.60

"Except as otherwise provided by this Ordinance, and subject to the exceptions set forth in this subsection, no person shall perform any grading, clearing, removal of vegetation, filing or creation of land coverage upon land within land capability districts 1a, 1c, 2 and 3. Said prohibition and provisions of subsections 12.10, 12.20, 12.30 and 12.40 do not apply to:

"12.61 Approved Subdivisions

Land within subdivisions approved by the agency's land capability district regulations, without reliance upon or reference to sections * * * 8.25(2) * * *."

15. Sections 12.10, 11 and 12 create classifications for "adequate", "potentially adequate" or in need of further study. The TRPA letter of October 29, 1981, Plaintiffs Exhibit 1-7, relating to hilltop lot 34 recites in part:

> "It has been found that your lot is in a critical land capability area and is located within a subdivision which has been classified in need of further consideration."

The TRPA advised Plaintiff that even though these lots had been granted a prior variance upon a Douglas County finding approved by the TRPA and reaffirmed by a federal court that this "development will not cause detrimental environmental consequences on the land of the applicant or other lands or water of the Tahoe Basin," that the Uppaway hilltop lots were nonetheless subject to Section 12.11(c):

> (c) "In need of further consideration" - poor placement of roads and drainage structures in relationship to natural features; unstable cuts and fills, which are incapable of satisfactory rehabilitation; unstable internal and downstream drainages and waterways; land coverage generally exceeds that permitted by the Agency's Land Use Ordinance; and the lack in individual cases of substantial construction of roads, utilities or drainage structures."

16. Plaintiff's choice in 1981 and 1982 was either to disregard TRPA's efforts to reimpose its jurisdiction and face threats of fines of $5,000.00 per day, or to seek a compromise. He chose the latter course, which was reasonable under the circumstances.

17. In September of 1981 Mr. Kelly met with Engineer Ernie Jones to request an update of the engineering drawings for the development of the seven hilltop lots. Plans were prepared and submitted to the TRPA in December citing all lots below 30% slope to comply with the Bailey system which had been adopted by the TRPA. Plaintiff's Exhibit 1-9. Mr. Barrett responded with Plaintiff's exhibit 10 stating that Mr. Kelly "must submit an application to the Agency to modify the final map and improvement plans of Uppaway."

18. On January 21, 1982, TRPA staff wrote another letter stating that Ordinance 81-5 was applicable to the hilltop and within an area "classified in need of further study." In May of 1982 Mr. Kelly's attorney telephoned TRPA's attorney to advise that Mr. Kelly was going to proceed with the construction of the Hilltop pursuant to prior approvals and court order and that 81-1 and 81-5 are not applicable to Uppaway. TRPA counsel wrote the following letter:

> "Thank you for your telephone call yesterday indicating Uppaway Estates intends to solicit bids for construction of a road on the hilltop portion of the subdivision. The purpose of this letter is to formalize a means through which we might at least clarify the issues involved in the proposed construction of the subdivision road. * * * *"
>
> "TRPA maintains the amendment of the Uppaway Subdivision map to approve the road in lieu of the funicular was a substantial modification of the subdivision, requiring further approval by the TRPA Governing Body." Plaintiff's Exhibit 1-14.

19. The TRPA position was refuted by Mr. Kelly's counsel who continued to refuse to recognize the application of 81-1 and 81-5 to the hilltop lots and refused to take the approved hilltop development back to the Governing Board of the TRPA.

On May 19, 1982, TRPA counsel responded as follows:

> "Pursuant to our meeting today, I am writing to confirm our understanding and agreement as follows:
>
> 1. Your clients shall submit, or cause to be submitted, to Gordon Barrett of TRPA staff a copy of all construction drawings and other pertinent information with respect to the proposed construction of improvements relating to Lots 33 through 39 of Uppaway Estates, including the proposed road, TRPA agreeing that by submitting such information, or by causing it to be submitted, your clients do not waive or otherwise detract from any legal right or contention possessed or maintained by them; and
>
> 2. Your clients shall not commence construction of said improvements until TRPA staff has had an opportunity to determine whether the proposed construction is substantially in accordance with the subdivision plans deemed approved by TRPA pursuant to the Tahoe Regional Planning Compact."

20. The TRPA letter was followed by a Kelly letter reiterating his contention that the change from a funicular to a road was not a substantial change and that the issues would not go to the Governing Board, that they would instead be settled with staff and the Chairman of the Governing Board, Bennie Ferrari. Plaintiff's Exhibit 1-16. TRPA counsel responded that Gordon Barrett is "doing his utmost to achieve an expeditious determination regarding substantial conformance." Chairman Ferrari was to make the final determination.

21. A meeting was then held on June 4, 1982, between TRPA Chairman Ferrari, Gordon Barrett and attorney Gary Owen, acting on behalf of the TRPA, and Paul Hogan and Bill Aird from the Law Offices of Daniel R. Walsh, representing Mr. Kelly. The primary issue was the development

of the hilltop lots including (1) the construction of the access road to the hilltop instead of the funicular, (2) the construction of the hilltop road including all offsite improvements for the lots and (3) construction of the lots. In consideration of the elimination of lot 39, and the relocation of other building envelopes to sites less steep than before, TRPA evidenced a willingness to allow construction to proceed without further action by the Board.

22. Gordon Barrett approved the improvement plans for lots 33-38 on July 22, 1982, in writing and with the TRPA seal. Plaintiff's Exhibits 41, 43, 44, 46, 1-21, 1-21A. Pursuant to a request on behalf of Kelly, Mr. Barrett also noted on the plans that the TRPA approvals were pursuant to the July 22, 1982 understanding. Plaintiff's Exhibit 1-24.

23. Mr. Barrett testified that the major concern of Kelly "was the legal status of these approvals and they seemed fairly adamant that they were not going to go to the Board for any kind of approval." Tr. 237. The only way Kelly could avoid going to the Board was to be found in substantial compliance with the previous approvals through the Court Order. Tr. 237 Mr. Barrett found the plans to be in substantial conformance, obviating compliance with 81-1 and 81-5. Tr. 218, 219.

This Court also finds the construction work completed by Mr. Kelly on the hilltop to be in substantial conformance with the subdivision plans deemed approved by the TRPA and the federal court and concludes that the changes made were, in a jurisdictional sense, minor changes.

24. Applications for TRPA approval of building permits for the hilltop lots on the consent calendar were filed with the TRPA on July 28, 1982, six days after the agreement. A fee of $220.00 was paid for each lot for a total of $1,320.00, which has never been returned to Mr. Kelly.

25. Construction of the access road instead of funicular, and hilltop road with offsite improvements for the six lots, plus infiltration trenches, commenced immediately. Except

for some minor items, the road and all offsite improvements were completed by October 1982. (Tr. 388-392, 397).

> "In addition to the environmental protection measures taken on the rest of the subdivision the hilltop measures included a connection from the roadside infiltration facilities up to each one of the individual building sites so that any drainage that was collected on the roof structures or on site of each one of the lots would be provided with a connection into the infiltration system so that any of the water that was created on the individual parcels would be integrated as a part of a master storm drainage system. The plan was submitted to and approved by the TRPA." Tr. 273
> *See* also Tr. 270, 271, 275, 278 and 283 for further description of the hilltop improvements. Plaintiff's Exhibits 1-42 depicts the actual construction conditions and 1-23 depicts the offsite improvements after construction."

26. Approved as being in substantial conformance with prior approvals and court order were (1) the change from funicular to road and the construction of this access road; (2) the construction of the hilltop road and all offsite improvements for the six lots and (3) the six lots.

27. Mr. Kelly was finally able to apply for building permits on a section of the subdivision which the TRPA conceded as adequate under existing rules and procedures.

28. Building plans were submitted to Douglas County for the purpose of obtaining building permits from the county on November 22, 1982. Plaintiff's Exhibits 1-27. Building permits were issued by Douglas County on December 30, 1982, for the six hilltop lots. Plaintiff's Exhibit 1-28. Mr. Kelly paid $1,600.00 for each building permit. On August 11, 1986, the Douglas County District Attorney issued an opinion reciting in part as follows:

> "It is my understanding that the permits were issued originally with 6 conditions. Following the

> approval Uppaway paid the required fees and proceeded to complete the conditions outlined by the Board of Commissioners. One of these conditions states that "construction shall not commence until all conditions are completed." One of the conditions which had to be completed concerned approval by the Tahoe Regional Planning Agency or a court of competent jurisdiction. Since TRPA has not acted on these permits it would seem that the process contemplated by the approval is still ongoing, therefore, the permits are still active so long as the approval of TRPA is being sought by Uppaway and the agency has not taken final action or the court has not decided the matter." Plaintiff's Exhibit 1-49.

29. The TRPA did not act on Plaintiff's applications from August, 1983, to April, 1984, on the basis of TRPA inaction on the files; (nonetheless, there is no evidence of intentional neglect or malice pertaining to this inaction over the winter months of 1983/84. See next two numbered paragraphs.) The California Attorney General's office, then obtained a preliminary injunction from the Federal Court in Sacramento that prohibited the TRPA from acting on applications for all building permits in the Tahoe basin.

30. During the period from 1982 through 1987, when Mr. Kelly's case-by-case applications under Ordinance No. 81-5 were filed with and pending approval by TRPA, TRPA was faced with the difficult and time-consuming task of implementing the novel and complex planning approach of the 1980 Compact, including its pressing deadlines for the adoption of environmental threshold carrying capacities and a new plan and ordinances attaining and maintaining them as well as meeting state and federal air and water quality standards. Added to this task was resolving the dilemma of what to do about the 17,000, more or less, preexisting single-family lots, of which Mr. Kelly's holdings were a portion. Ordinance 81-5, adopted June 1981 and effective

August 1981, was an interim measure at least partially to deal with the issue of the numerous lots in the State of Nevada, and particularly those in high-hazard classifications such as Mr. Kelly's. The ordinance resulted in many case-by-case applications, the processing of which, commencing in August 1981, was occurring simultaneously with TRPA'S compliance with the regional planning mandates of the 1980 Compact.

31. In addition, in early 1983, pursuant to a TRPA staff indication that winter snow conditions precluded on-site assessment of the proposed case-by-case lots, Mr. Kelly, through his counsel, advised TRPA that Mr. Kelly would not be prejudiced by the winter delay. During the spring and summer of 1983 TRPA was processing numerous case-by-case applications, but because of the Compact deadline for adopting a new regional plan, it determined in August 1983 that it no longer legally could issue case-by-case permits, including those pursuant to Mr. Kelly's applications. In its regional plan adopted in April 1984, however, TRPA specifically provided for the continued processing and approval of case-by-case applications such as Mr. Kelly's. That procedure was not allowed to commence because TRPA's 1984 Plan was immediately enjoined from taking effect, through an injunction which prohibited TRPA from approving development projects, including single-family residences, until adoption of TRPA's 1987 Regional Plan.

32. The TRPA 1987 Regional Plan and IPES were finally adopted by the TRPA on July 1, 1987, which sought to deny the development of the Plaintiff's hilltop lots on the basis of the content of the new Plan and Ordinances. This lawsuit followed. Despite the delays, the Court finds actions of the TRPA to be reasonable and justified under all of the circumstances.

33. Kelly agreed to and did forfeit hilltop Lot 39 in exchange for the TRPA promptly processing his applications for TRPA approval of six building permits for Lots 33, 34, 45, 36, 37, and 38. The TRPA did not process these

applications and consequently they were never approved. Plaintiff Kelly should be returned to the same position he was in before he agreed to forfeit Lot 39. There was a failure of consideration of the condition upon which he gave up Lot 39 in the first place. Mr. Kelly can file an amended map with Douglas County to reinstate Lot 39. Reinstated Lot 39 will be considered in the same legal position as Lots 33, 34, 35, 36, 37 and 38.

34. Considering all Douglas County and TRPA prior approvals and the federal court order, Mr. Kelly does not have to obtain an allocation under Chapter 33 of the TRPA ordinances for these seven lots. The TRPA cannot force Mr. Kelly or the purchasers or assigns of these lots to stand in line with everybody else in light of the history of this development. The Douglas County building permits issued for these seven (7) lots are above and beyond the TRPA allocation to Douglas County. The exemptions for these lots run with the land and can be transferred to purchasers or assigns from Mr. Kelly.

35. Mr. Kelly, his purchasers or assigns will have to pay the air quality fee of $1,000 and the $2,500 refundable security deposit to assure proper completion of the residence in compliance with Douglas County ordinances and permit conditions. However, these lots are exempt from the water quality mitigation fees imposed by TRPA ordinance for each square foot of new coverage. Mr. Kelly has already spent considerable funds on mitigation. The fees Mr. Kelly paid to the TRPA in 1982 as described in finding 24 above may be credited against the fees that may be due the TRPA under this finding.

36. As a specially-engineered "planned unit development", Uppaway is far more than a traditional subdivision. What was "deemed approved" as Uppaway Estates under Article VI(k) of the 1969 Compact was a tentative subdivision map for 39 vacant, 2,500 square foot lots and a permit for "excess coverage" under Section 8.25 of the Land Use Ordinance.

When Uppaway became legally approved, the subdivision map was not just a device which created new and smaller parcels from a larger parcel. The "approved" permit stated exactly how many rooftops, roadways and driveways would interfere with the natural state of the topography and the nitrogen and phosphorus absorbing features of the soil and vegetation. The specific placement of each building envelope was set forth along with the exact amount of coverage to be contained therein. A height limitation was included. The utilities to each lot were delineated.

37. Section H of the Ray Smith report (Exhibit 39) contains the "heartwood" of Mr. Kelly's 1974 application and allows for 4.88 acres of coverage (212,900 square feet). This Court finds that the land coverage contained in the Ray Smith report represents an already adjudicated issue favoring Mr. Kelly, and the "deemed approved" stamp covers the whole development, and in that sense, makes Uppaway different from any other subdivision in the Tahoe Basin.

38. The development was engineered with an elaborate infiltration system to control drainage and erosion. All hard road surfaces tilt inward toward specially designed infiltration trenches working together with slope stabilization measures on both sides of the roadways. The infiltration system itself was purposefully over designed to protect against fifty year storm events, although the TRPA regulations at the time (and still) only required twenty year, one hour storm event mitigation measures.

39. Never, during the period of time the system was designed and installed, did the Plaintiff evidence any callous disregard for the nutrient transport sensitivities of his project. The design which he commissioned for the so-called "offsite" improvements (every place but building pads) was in every respect above-standard: the contractors did a workmanlike job of installing the tilted roadways, the infiltration trenches, the junction boxes and other facets of the system; appropriate warning signs telling people to stay

off the rocks are strategically placed on roadways; the asphalt appears evenly sloped and well-maintained.

There is absolutely no evidence that the infiltration system has ever failed, at least in the upper reaches of the subdivision where the hilltop lots are located, even though it has been in place now for several years. The hilltop lots are located in places which are as flat as feasible. The lots themselves are quite a distance from the shores of the lake and migrating water, even subsurface flows, would have to pass through a portion of the redundant system, as well as though several hundred feet of fairly heavily vegetated open space before reaching the lake. As long as the infiltration trenches are cleaned and maintained, the evidence shows that the likelihood that the hilltop lots would generate nutrient transport that would reach the lake is practically non-existent. It would be reasonable for the TRPA to require owners of property with systems like Uppaway to post a performance bond to assure regular clean up and maintenance of these systems.

40. To the extent that land coverage issues under IPES are in conflict with the land coverage issue adjudicated by the federal court decision, IPES must give way to the federal court decision. The IPES system, which is built upon a modified Bailey system, does not reflect such remarkably new insights into the Tahoe ecology as to vitiate the basis for the earlier approvals, given this Court's finding of lack of detrimental impacts, and the special *de jure* status of this subdivision under the Federal Court ruling.

Nevada has a strong legal tradition sanctioning planners from changing their minds about permissible uses after existing zoning and land uses ordinances have encouraged a developer to invest substantial sums in reliance on prior representations. Mr. Kelly has spent substantial sums in reliance upon his approvals, and the doctrine is properly applied to this case.

41. Since this Court has found that the prior federal court ruling is dispositive on the subject of how much gross land

coverage is available to Mr. Kelly, there is no legal impediment to Mr. Kelly preventing him from proceeding immediately to build or sell his seven (7) hilltop lots in a manner consistent with these findings.

CONCLUSIONS OF LAW

1. The issues relating to the Plaintiff's hilltop lots 33, 34, 35, 37, 38 and 39 have been fairly tried in 1975 by the United States District Court for Nevada, and the doctrine of res judicata is applicable to the following issues:

(A) The excess land coverage for Uppaway Estates was approved by a variance legally granted under Section 8.25(2) of the TRPA land use ordinance.

(B) Uppaway was approved under the TRPA Compact because of lack of dual majority vote.

(C) Considering all Douglas County and TRPA prior approvals and the federal court order, Mr. Kelly does not have to obtain an allocation under Chapter 33 of the TRPA ordinances for these seven lots. The TRPA cannot force Mr. Kelly or the purchasers or assigns of these lots to stand in line with everybody else in light of the history of this development. The Douglas County building permits issued for these seven lots are above and beyond the TRPA allocation to Douglas County. The exemptions for these lots run with the land and can be transferred to purchasers or assigns from Mr. Kelly.

(D) Mr. Kelly, his purchasers or assigns, will have to pay the air quality fee of $1,000 and he $2,500 refundable security deposit to assure proper completion of the residence in compliance with Douglas County ordinances and permit conditions. Mr. Kelly has already spend considerable funds on mitigation. The fees Mr. Kelly paid to the TRPA

in 1982 as described in finding 24 above may be credited against the fees that may be due the TRPA under this finding.

(E) Since this Court has found that the prior federal court ruling is dispositive on the subject of how much gross land coverage is available to Mr. Kelly, there is no legal impediment to Mr. Kelly preventing him from proceeding immediately to build or sell his seven (7) hilltop lots in a manner consistent with these findings.

2. Kelly is not guilty of laches.

3. On July 22, 1982, an understanding was reached between Plaintiff Kelly and the TRPA whereby access to the hilltop would be by road rather than funicular; that Kelly could proceed with construction of the hilltop road and all offsite improvements for hilltop lots 33, 34, 35, 36, 37, 38.

4. The understanding of July 22, 1982, between Plaintiff Kelly and the TRPA could not be implemented because of a moratorium placed on the TRPA by a California Federal Court Order. There was a failure of consideration of the condition upon which Mr. Kelly gave up Lot 39. Mr. Kelly can file an amended map with Douglas County to reinstate Lot 39 and the TRPA shall take no action to interfere with Kelly's right to obtain a Douglas County building permit for Lot 39 or build thereon.

5. The actions of the TRPA during the period from 1982 to 1987 are not confiscatory and do not require compensation.

6. Mr. Kelly's Douglas County building permits for six hilltop lots are still valid from the standpoint of the parties to this litigation but, of course, remain subject to the jurisdiction of Douglas County, and any of its ordinances, special conditions, or regulations.

7. Building envelopes will not exceed 2,500 square feet per parcel together with a small (380 square foot) allowance

for impervious coverage for driveways (see Explanatory Order of even date herewith).

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff William Cody Kelly may forthwith proceed to obtain building permits from Douglas County for hilltop lots 33, 34, 35, 36, 37, 38 and 39, and he, his purchasers or assigns, may construct residences on these lots in a manner consistent with the above Findings of Fact and Conclusions of Law.

DATED this 1st day of November, 1991.

/s/ Charles M. McGee
DISTRICT JUDGE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CROWELL, SUSICH, OWEN & TACKES, LTD., and that on the 6th day of November, 1991, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of Notice of Entry of Judgment, addressed to:

Richard M. Skinner
Deputy Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244-2550

Brian Chally
Deputy Attorney General
State of Nevada
123 West Nye Lane
Carson City, NV 89710

Jeffrey Blanck, Agency Counsel
Tahoe Regional Planning Agency
P. O. Box 1038
Zephyr Cove, NV 89448-1038

I also certify that a copy of the Notice of Entry of Order was personally served by hand delivery on November 6, 1991, during regular business hours, to the Law Offices of Daniel R. Walsh, located at:

Daniel R. Walsh, Esq.
Capital Plaza
1100 East William, Suite 217
Carson City, NV 89701

/s/ Lauren Arends
LAUREN ARENDS